F. M. S. REPORTS.

[APPELLATE CIVIL JURISDICTION]

POYSER, C.J., McELWAINE, C.J. (S.S.) & GORDON-SMITH, J.

March 16, 1940.

MURUGAPPA CHETTIAR

[Plaintiff (Appellant)]

vs.

S. SEENIVASAGAM

[Defendant (Respondent)]

[PAHANG CIVIL APPEAL No. 2 of 1939]

Land—transaction analogous to an English mortgage—Rights and duties of Mortgagor and Mortgagee when mortgagee goes into possession—Liability of Mortgagee to maintain and cultivate agricultural land—Direction in Judgment not embodied in formal decree—whether examination of the reasons for the judgment permissible to ascertain whether such a direction is obiter dictum or binding—whether Court of Appeal can review its own former decision—case law examined and discussed.

The respondent, a government servant, speculated in rubber and bought several pieces of rubber lands. The lands were registered in the name of the appellant who had advanced moneys on promissory notes for the purchase of these lands. The appellant had given the respondent a letter or letters undertaking to reconvey the lands to the respondent when principal and interest due to him had been fully paid off. When such principal and interest were outstanding the appellant in February 1932 went into possession of the rubber lands which remained in his possession for over two years, the appellant continuing the management of the lands in the same way as the respondent had been doing. The respondent being unable to pay off his increasing indebtness and all—attempts at settlement having failed the appellant instituted a series of suits on the promissory notes and for an account to be taken of all moneys due to him. The respondent by his defence counter-claimed for damages for mismanagement and neglect of the lands during the appellant's possession.

The suits were tried together before Burton, J. who awarded damages to the respondent on the ground that the appellant in possession was a trespasser. The appellant appealed to the Court of Appeal which dismissed the counter-claims holding that an action for trespass will not lie against the registered owner. The appellant both before Burton, J. and the Court of Appeal contended that his legal position and the liabilities assumed by him in consequence with regard to the care and management of the estates were analogous to those of a mortgagee in possession under English Law; **i.e.**, that he was liable for an account on the footing of wilful default and for gross negligence. The Court of Appeal by a majority (Thomas, C.J. dissenting) accepted that contention and referred the matter to the Registrar for an inquiry as to gross negligence and for an account to be taken on the footing of wilful default. **Vide** 5 M.L.J. p. 217.

In delivering the leading judgment in the Court of Appeal Terrell, J. said **inter alia** "It must be remembered ....without making the Plaintiff responsible for keeping up the estates to the highest possible standard a certain minimum of care and cultivation was clearly necessary." The formal decree however as settled by the learned Judge himself after hearing Counsel for all parties, contained no reference to this direction.

In due course the Registrar held an inquiry under that judgment, heard further evidence and dismissed all claims for gross negligence and for surcharges on the footing of wilful default, but allowed some trifling falsifications. He issued his certificate to that effect.

The respondent appealed to Terrell, J.A. against the Registrar's findings on gross negligence and wilful default but limited his appeal to the claims under reconditioning and non-tapping as regards the two blocks —Blocks C. 2 and D.—of Cheroh Estate. In respect of these two blocks it was common ground throughout every stage of the proceedings that the appellant had done nothing by way of maintaining or tapping to the two estates. The respondent claimed that lallang and blukar grew up into the estates and that he had suffered damage measureable by the cost of putting them back into a proper condition. He also claimed that in consequence of such lallang and blukar having grown up these two blocks when they came to tappable age did not receive any assessment from the Rubber Restriction Department and that he was entitled to surcharge the appellant to the extent of the income that ought to have been received if the estates had been maintained properly, and an assessment obtained.

Terrell, J.A. **held** that the Court of Appeal had clearly directed that a minimum of care and cultivation was clearly necessary, that the appellant had admitted that he had done nothing and that therefore **prima facie** he must be guilty of gross negligence. He therefore allowed the Appeal, set aside the certificate of the Registrar and referred the matter back to him for further inquiry as to damages, if any.

From this judgment setting aside the Registrar's certificate the Appellant appealed.

Held, on the analogy of the English Law of Mortgages one principle of English Law can be regarded as reasonably applicable to this case. That principle is where the mortgagee has gone into possession it is the duty of the mortgagor to afford him advice and aid for the purpose of making the estate as productive as possible; he cannot stand by and complain afterwards. It is the bounden duty of a mortgagor, if he knows the mortgagee is doing something injurious to the property, or that he is not making the most of it, to inform him of what is going on, and what ought to be done. The respondent failed to exercise his rights or duties as a mortgagor as described in **Millet v. Davey**(16) and on that —ground the Appeal was entitled to succeed.

Held further, (Per Poyser, C.J. and Gordon-Smith, J.A., McElwaine, C.J. (S.S.) dissenting) that the direction of the Court of Appeal with regard to the liability on the part of the Appellant to exercise a certain minimum of care and cultivation cannot be regarded as **obiter.**

Held further, (Per Poyser, C.J. and Gordon-Smith, J.A.) that such direction whether in law correct or not, this Court cannot, in these proceedings which are the sequel to a decision of the Court of Appeal in which that direction was given, say that it was an incorrect direction, whether or not this Court is bound by its own prior decisions.

Held further, that in order to find out what the Court of Appeal decided we cannot look at the decree alone to ascertain what it did decide. We can also look at the judgment.

Held, by McElwaine, C.J. (S.S.) that the phrase 'minimum of care and cultivation' was not necessary to the decision of the Court of Appeal and was therefore obiter and not binding on this Court.

Held further, by McElwaine, C.J. (S.S.) that if an Order contains contradictory directions it is permissible to look at the reasoned judgment to ascertain whether the judgment was self-contradictory, and if it is found not to be self-contradictory but to support one part of the Order and not to support a contradicting part of the Order, the part of the Order which is supported by the reasons of the Court must prevail over the part which not only is not so supported but contradicts the part which is so supported.

Cases referred to:—

(1) *Adair & Co. v. Birmbaum,* (1938) 55 T.L.R. 234.

(2) *Preston Banking Co. v. William Allsup & Sons,* (1895) 1 Ch. D. 141.

(3) *Bole v. Horton,* Vaughan at p. 382.

(4) *Bompas v. King,* 33 Ch. D. 279.

(5) *Brijratan v. Jaynarain,* I.L.R. 37 Cal. at p. 657.

(6) *Chaplin v. Young,* 33 Beav. at p. 337; 55 E.R. 395.

(7) *Godfrey v. Watson,* 3 Atkyn. at p. 518.

(8) *Grill v. General Iron Screw Collier Co.,* L.R. 1 C.P. 614.

(9) *Haji Abdul Rahman v. Mohamed Hassan,* (1917) A.C. 209.

(10) *Hughes v. Williams,* 33 E.R. p. 187; 12 Ves, at p. 495.

(11) *Hughes v. Williams,* 12 Ves. at p. 495.

(12) *Jones v. Lewis,* (1919) 1 K.B. 328.

(13) *Kali Krishna Tagore v. Secretary of State for India,* I.L.R. 16 Cal. p. 173.

(14) *Langat Singh v. Janki Koer,* I.L.R. 39 Cal. 265.

(15) *Mayer v. Murray,* 8 Ch. D. at p. 428.

(16) *Millet v. Davey,* 31 Beav. at p. 477; 54 E.R. 1221 & 1223; 7 L.T.R. (N.S.) 550.

(17) *Murugappa Chetty v. Seenivasagam,* (1936) F.M.S.L.R. pp. 72–3; 5 M.L.J. 217.

(18) *Nixon v. The Attorney General,* (1931) A.C. 184.

(18A) *Oxenham v. Ellis,* (1854), 18 Beav. 593.

(19) *Prytherch, In re,* at p. 600.

(20) *Richards v. Morgan,* 4 Y. & C., Ex. App. 570.

(21) *Rowe v. Wood,* 2 Jac. & W. at p. 555; 37 E.R. 740.

(22) *R. v. Governor of Brixton,* (1910) 2 K.B. p. 1056.

(23) *Re Shoesmith,* (1938) 2 K.B. p. 637.

(24) *Slack v. Leeds Industrial Co-Operative Society Ltd.,* (1923) 1 Ch. p. 451.

(25) *Watts v. Assets Co.,* (1905) A.C. at p. 330.

(26) *Wragg v. Denham,* 160 E.R. 335.

(27) *Woon Foon Hok v. Muttiah Chetty,* (1933–4) F.M.S.L.R. 215.

(28) *Albert v. Grosvenor Investment Co.,* L.R. 3 Q.B. at pp. 128 & 129.

(29) *Ballantyne v. Mackinnon,* (1896) 2 Q.B. at p. 462.

(30) *In re Bank of Hindustan, China & Japan Alison's Case,* 9 Ch. App. at pp. 25–26.

(31) *County of Gloucester Bank v. Rudry,* (1845) 1 Ch. D. at p. 633.

(32) *Giblin v. Mcmullen,* L.R. 2 P.C. pp. 317, 336–7.

(33) *Harries v. Crawfurd,* (1919) A.C. at p. 743.

(34) *Henderson v. Astwood,* (1894) A.C. 150, 163.

(35) *Houston v. Marquis of Sligo,* (1885) 29 Ch. 448.

(36) *Inayatullah v. Ameer Buksh,* 25 W.R. 225.

(37) *Krishnon Behari Roy v. Brojeswari,* 2 I.A. 283.

(38) *Krishna Chandra Roy v. Surendra Nath,* (1932) A.I.R. Cal. 385 at p. 387.

(39) *Martin v. Price,* (1894) 1 Ch. at p. 284.

(40) *May, In re,* 28 Ch. D. 576.

(41) *Noyes v. Pollock,* 32 Ch. D. p. 61.

(42) *Perry v. Walker,* 24 L.J. Ch. 319.

(43) *Quarrell v. Beckford,* 56 E.R. at p. 103.

(44) *Russell v. Smithies,* 145 E.R. 811.

(45) *Sandon v. Hooper,* 49 E.R. 820–821.

(46) *Shah Mukhun Lall v. Baboo Sree Kishen Singh,* 20 E.R. at p. 312; XII Moo. I.A. 192, 193.

(47) *Surajmoni v. Suddanund,* 20 W.R. at p. 379.

(48) *Tan Ah Boon's case,* (1936) F.M.S.L.R. 100; 5 M.L.J. 187.

(49) *Tipton v. Tipton,* 7 Ch. D. 194.

(50) *Warner v. Jacob,* 20 Ch. D. 220.

(51) *Re Young & Harston's Contract,* 31 Ch. D. at p. 174.

CIVIL APPEAL.

Roland Braddell (*E. D. Shearn* and *R. Ramani* with him) for the Appellant:

(After fully stating the facts summarised in the head-note and referring to the judgments). The only question involved at this stage of this Appeal is a claim for what is called 'reconditioning' and damages from non-tapping Block C 2 and D of Cheroh amounting to a sum of $4,897.49.

Before Terrell, J.A. O'Connor stated the position thus:—

1. The Court of Appeal had held that in law the Chettiar was bound to carry out a minimum of care and cultivation,
2. The Chettiar did nothing on Block C 2 and D, and
3. Therefore gross negligence was established.

Terrell, J.A. upheld that argument. He also held on a further issue that Seenivasagam had not stood by so as to lose his remedies (if any).

In this Appeal I formulate the issues for decision as follows:—

1. Did the Court of Appeal direct as a matter of law that it was the duty of the Appellant to exercise a minimum of care and cultivation.
2. If so, was that direction *obiter* and so not binding upon the Registrar and Terrell, J.A.,
3. If it was not *obiter,* was the direction correct in point of law, and
4. Did the Respondent stand by so as to loose his remedies (if any).

On the first issue I submit that the Court of Appeal did not and could not have made such a direction as a binding direction as the matter was not before it at all. There was no discussion at all before the Court of Appeal as to the duties of a Mortgagee in possession. The question was left completely open. I submit in order to decide that an inquiry was necessary for ascertaining the damages due to gross negligence it was not necessary to decide what constituted gross negligence. I say that direction was merely *obiter.*

Harries v. Crawfurd,(33).

Slack v. Leeds Industrial Co-operative Society Ltd.,(24).

Martin v. Price,(39).

The last case shows that you can disagree with such a direction if you think it is unjust. In this case it would be unjust to treat it as a binding direction because that proposition of law was never litigated, never set up, never argued. The phrase "minimum of care and cultivation" is not found in any text book. It is Terrell, J's. own coinage.

I now proceed to the merits of this Appeal whether in this case on the facts there was established gross negligence or wilful default. (Counsel then dealt with the evidence and proceeded). On those facts I make the following points:—

1. I took over these 2 blocks in a condition of heavy growths due to the ordinary processes of nature in this country,
2. I merely continued to do exactly that which had been done before I took them over,
3. When I took over, blocks A and B were being tapped on the Bagi Dua System, the other party being Lee Chong,
4. During the absence of Seenivasagam in Ceylon he was making it perfectly clear that he could not make the payments and that he wished no expenses incurred save the very least and he was imploring me not to realise the security. In December 1932 he got extension for one year,
5. From the time when he came here until the interview with Warriar no complaints about the condition of the estates were made at all,
6. In July 1933 he opened up 24 acres of C,

7. When Restriction came in, parties being already involved in three suits no request was made to the Chettiar that anything should be done to block D,

8. During the whole crucial period it was thought this was a gold mine and to its value as such they were looking, cupidity preventing them from settling with the Chettiar.

Now for the Law: Negligence is the antithesis of duty; gross negligence is the breach of a duty that is slight. The emphasis is on the duty, not the negligence.

Giblin v. McMullen,[32].

Also where no duty no default.

Albert v. Grosvenor Investment Co.,[28].

Now first and foremost we must not confuse a Mortgagee's rights with his duties. With deference, this was the confusion in the mind of the learned Judge when he decided that I had the very definite obligation of doing something. Indeed he went further and said that I must have spent my own moneys. The first and foremost duty of a Mortgagee in possession is to keep down the debt.

Quarrel v. Beckford,[43].

Meyer v. Murray,[15].

(The case shows the tremendous authority of Fisher). A Mortgagee does not assure the income from the property.

Shah Mukhun Lall v. Baboo Sree Kishen Singh,[46].

A most important principle: A Mortgagee must not engage in speculation and adventure but the Mortgagor is bound to afford his advice and aid.

Hughes v. Williams,[10]. *Millett v. Davey,*[16].

These two cases establish that it was *not* the duty of the appellant to open up block C, or D but it *was* the duty of the respondent to have informed the appellant if he had so desired.

Now the rights and duties of the appellant in this case can be considered from different aspects. If you consider it as a duty to do repairs then the law is the Mortgagee need only do such repairs that can be paid for out of income after his interest had been satisfied.

Richards v. Morgan,[20].

If we look at it as a case of improving the property the cases establish that a Mortgagee has no such duty whatsoever but a very limited right.

Sandon v. Hooper,[45]. *Tipton v. Tipton,*[49]. *Henderson v. Astwood,*[34].

If you consider it as a business so far from there being a duty to carry it on there is only a right.

Bompas v. King,[4] at p. 283.

County of Gloucester Bank v. Rudry,[31].

Row v. Wood,[21].

A Mortgagee is not a trustee for the Mortgagor.

Warner v. Jacob,[50].

See also *Fisher* (7th Edn.) 722.

23 *Hailsham,* 336.

Coote (7th Edn.) 820, 1222.

Kerr on Australian Lands Titles (Torrens) System, 411.

Williams on the Law of Account, pp. 151, 154.

Russell v. Smithies,[44].

I have reserved to the last the two cases that were very much referred to in the Court below:—

Wragg v. Denham,[26].

Perry v. Walker,[42].

The former shows that I am only liable for acts of commission and then only for deterioration as a result of gross negligence.

In the latter case there was a forfeiture and in effect the Mortgagee allowed the mortgaged premises to cease to exist. In this present case the only claim for deterioration of the estates was the claim for damages for disease to the rubber and the stunting of the trees. Both these claims have now been abandoned. In fact, no attempt has been made to show any depreciation of the property.

The proper measure of damage in such a case is the depreciation of the property between the time I went into possession and the time I handed it back.

Charlesworth on Negligence, p. 516.

The judge however has fixed an entirely different measure and a different standard. The only claim left now is not for depreciation but for reconditioning.

I now come to the last issue I formulated and I submit that the evidence most clearly establishes that the respondent stood by and lost his remedies.

(Counsel then referred to the evidence).

The learned Judge considered this plea as confession and avoidance. I submit it was a complete defence and the respondent had a definite duty to afford his advice and aid.

The learned Judge did not consider the decree of the Court of Appeal, but went behind it to his own reasons for the judgment and decided on his own *dicta* which he held bound him and the Registrar. He thereby really over-ruled the decree of the Court of Appeal. The Court of Appeal directed an inquiry whether or not any acts of the appellant in possession amounted to gross negligence. The Learned Judge treated the whole matter as if the decree had declared gross negligence and only directed the Registrar to ascertain damages. I say you cannot go behind the formal Decree, if you can refer to the reasons for the judgment then I say that the direction as to minimum of care is only a *dictum* and not binding on the Judge below, the parties, or this Court.

K. K. O'Connor (*Hastings* with him) reviewed the facts and the history of the matter and referred to the reasons for his Certificate given in the judgment of the Registrar many of which admittedly could not be supported.

This case has been put against the Respondent as though he were asking that the mortgagee should improve his property. The respondent has not asked for his property to be improved. He has asked for reasonable maintenance, or damages for gross negligence in failing to maintain part of Cheroh estate in a reasonable state of control and cultivation. It was in such a state when the Appellant ousted the Respondent and took possession. The evidence shows that Cheroh Block D. was in a reasonably clean condition in February 1932. It had been reasonably well kept till a few months before that date. It is not correct that it had been totally neglected for a year before that and that it was in a condition of heavy growth when taken over. What growth there was young and small and the land was clear round the trees. It was in a condition to be classed as a rubber estate and to be tapped when it came into bearing. The Appellant took possession. For 43 months he effected no cultivation or control whatever. By that time this block had become "a dense forest with rubber trees, a miniature forest". One result was that when Restriction came in, on 1st June 1934, Block D. could not even be classed as a rubber estate or obtain an assessment. Block C. obtained an assessment by reason of the fact that $2—an acre had been spent on rentices in 1933. But the Appellant, though he was taking the profits of all the estates, would not spend $2—an acre—i.e. $320—or any sum—on Block D. although by so doing he could get export rights which were saleable for thousands. That was not a speculation: it was a certainty. The rents and profits of the mortgaged property, properly so called, exceeded the outgoings, excluding, interest, and were sufficient for this expenditure. The revenue would thereby have been greatly increased and the debt would have been reduced far sooner. A mortgagee should be reasonably diligent to reduce his debt.

This is an appeal against an order of the Judge setting aside a Certificate of the Registrar. The matter now before the Court is whether or not it was right to set that Certificate aside. It is necessary to bear that in mind, because what the Appellant is trying to do is to get this Court of Appeal to re-hear a previous decision of the Court of Appeal in the same case, and that is not permissible. An appeal against an Order discharging a Registrar's Certificate certifying the result of an inquiry directed by the Court of Appeal cannot be used as a vehicle for challenging the principles of law laid down by the Court of Appeal.

Braddell in opening formulated four issues. (*O'Connor* referred to the issues as set out above). The third issue was:—

> "If it" (i.e. the direction of the Court of Appeal) was not **obiter**, was the direction correct in point of law?"

In that issue *ex hypothesi* the direction is *not obiter*. That means "Even if there was a deliberate finding or direction of the Court of Appeal on a matter in issue in this case, was it correct?" Thus this Court is now being invited to re-hear and overrule a deliberate previous decision of the Court of Appeal on a matter in issue in this case. I submit that is absolutely inadmissible and Issue No. 3 is not open to the Appellant. Authorities have been cited where Courts of Appeal have, usually with reluctance, refrained from following *obiter dicta* of a previous Court of Appeal in a different case. But there is no authority for the proposition that a Court of Appeal, on appeal from a Registrar's Certificate, is free to overrule directions which *ex hypothesi* are not *obiter* of a previous Court of Appeal in the same case.

As to Issues Nos. (1) and (2) if the Appellant alleges, as he does, that the direction he complains of is *obiter,* he is faced at the outset by the difficulty that

Terrell J.A. who himself delivered the judgment in the Court of Appeal has since held, in a careful reserved judgment, that the passage in question was binding on him and must regulate the decision.

(Counsel then read the passage from the judgment of the Court of Appeal which is set out in the head note.). That directs:—

(a) that the plaintiff was to account on the footing of wilful default;

(b) that he was to be chargeable with gross negligence;

(c) that it must be remembered that this was not a case where houses had been allowed to fall into disrepair because there was no money to repair them: the plaintiff was in possession of an agricultural estate and was not entitled merely to take the profits from the rubber and allow the estate to go to wrack and ruin: and that, without making the plaintiff responsible for keeping up the estate a certain minimum of care and cultivation was clearly necessary.

Those were all necessary directions and not *obiter*, because it had been argued by the present appellant in his appeal to that Court of Appeal that the position of a mortgagee in possession of an agricultural estate was analogous to the position of a mortgagee in possession of houses needing repair: and that he was only liable for gross negligence and not for absence of ordinary care, and need only go as far as the excess of profits over interest would allow him and that as there was no excess of profits over interest, he was excused. It is incorrect to say that there was no discussion at all before the Court of Appeal as to the duties of a mortgagee in possession.

In the passage in question the Court of Appeal was accepting the Appellant's arguments in paragraphs (a) and (b) above and rejecting his argument in paragraph (c) The Court of Appeal was laying down, as directions of law for the guidance of the Registrar, its decisions on issues raised and argued before it. It directed that it must be remembered that the position of a mortgagee in possession of an agricultural estate was *not* the same as that of a mortgagee in possession of buildings: and that, although the highest possible standard was not to be required, nevertheless a minimum of care and cultivation was clearly necessary.

Those were necessary directions of law for the guidance of the Registrar who was ordered to hold an enquiry as to whether any or which acts or omissions by the plaintiff constituted such gross negligence as to make the plaintiff liable therefor.

The Court of Appeal ordered further that the findings of Burton J. were not to be regarded as conclusive, because he had proceeded on a different measure of damages and "because an appeal has been lodged against Burton J's. findings of fact and this part of the appeal had not been argued". That is to say the part of the appeal which was against the *facts* was not argued.

What the Court of Appeal did was to give its directions on the points of law, which had been raised and argued, and to order an enquiry by the Registrar into the facts, being the part of the appeal which had not been argued. That is the plain meaning of the judgment.

(Counsel then referred at length to the pleadings, and arguments in the Suit in the Court below and before the Court of Appeal for the purpose of showing that the points of law decided by the Court of Appeal in the above passage were raised, put in issue and argued both in the Court below and in the Court of Appeal, where many of the same authorities were cited as were now again cited to this Court. He submitted that the directions of the Court of Appeal were necessary decisions on the issues of law raised to them and necessary directions for the guidance of the Registrar and were not *obiter*).

It has been suggested that the Court of Appeal cannot have intended to decide in advance that the plaintiff would be liable for gross negligence if he did not do a minimum of care and cultivation, because the Court of Appeal had before it the fact that he had not cultivated Cheroh Blocks C.2 and D. and, nevertheless, ordered the Registrar to enquire whether any or which acts or omissions of the plaintiff constituted such gross negligence as to make him liable. But there is really no inconsistency. At that stage there were many claims for gross negligence in addition to those relating to Cheroh Blocks C. 2 and D., and there was plenty of matter on which the Order could operate. Moreover it is not correct to say that the Court of Appeal had before it the fact that Cheroh Blocks C. 2 and D. had not been cultivated. The Court of Appeal had *no* facts before it at all, because, for the reasons given, Burton J's findings of fact could not be accepted or considered.

The answer to Issue No. (1) is "Yes"; and the answer to "Issue" No. 2 is that the direction was not *obiter* and was binding on the Registrar and Terrell J. *Harries* v. *Crawfurd*[33] at p. 717 has no application to our case.

It was argued for the Appellant that the passage from the judgment of the Court of Appeal which he finds in his way was not part of the decision because it is not in the decree.

In order to discover what was decided in a suit it is not enough to refer to the decree without the judgment. It is in the judgment that findings on the issues are recorded.

Kali Krishna v *Secretary of State*[13].

And the judgment may operate as *res judicata.*

Krishna Chundra Roy v *Surendra Nath*[37].

Enaetoolah v *Ameer Buksh*[36].

Krishna Behari Roy v. *Brojeswari Chowdrana*[37] *Casperz Estoppel* p. 465.

Preston Banking Co. v. *William Alsopp and Sons*[2].

I do not think English authorities are applicable, but I refer to

13 *Hailsham* 497.

Houston v *Marquis of Sligo* [35].

In re May, (40).

Whether the direction of the previous Court of Appeal was right or wrong, it is not open to challenge by way of appeal against the Registrar's Certificate.

Slask v *Leeds Industrial Society*[24] at p. 431 is clearly distinguishable. That was a case where there were *obiter dicta* of a previous Court of Appeal in another case. Here we have directions not *obiter* of the Court of Appeal in the same case. Neither *Slack's* case nor *Martin* v *Price*[39] at p. 277 is authority for the proposition that such directions can be reviewed by a subsequent Court of Appeal in the same case.

As, in my submission, Issue No. 3 is not open to the Appellant, I go on under protest to examine the position in law first of mortgagees in possession generally, and secondly of a mortgagee in possession of an agricultural estate as regards his liability for husbandry.

The general principle applicable to all mortgagees in possession is that a mortgagee who goes into possession of the mortgaged property, and thereby excludes the mortgagor from control of it, is bound to account to the mortgagor not only for the rents and profits which he actually receives, but also for the rents and profits which, but for his wilful default or neglect, he might have received, that is for everything which he has received or ought to have received while he continued in possession.

Hailsham Vol. 23 p. 368 paragraph 549.

Chaplin v *Young*[6] at pp. 330, 337, 338.

A mortgagee in possession is liable for non-feasance as well as for mis-feasance.

Noyes v *Pollock*[41]. *Perry* v *Walker*[42]. *Hughes* v *Williams*[10].

What is "wilful default"? "Default" like "negligence" is a relative term and means not doing what is reasonable in the circumstances. "Wilful" merely means "intentional" or "deliberate".

re Young and Herston's Contract[51] at pp. 168, 174, 175.

What may be "reasonable in the circumstances" when a mortgagee takes possession of house property, is not necessarily "reasonable in the circumstances" when he takes possession of an agricultural estate. It is fallaceous to apply rules relating to a mortgagee's duty to repair house property, to as mortgagee's duty to maintain an agricultural estate.

Gross negligence means more than ordinary negligence. *Giblin* v *McMullen*[32] at p. 337. But gross negligence is also a relative term depending on the circumstances of the case. Wilful default may be gross negligence, and both depend on the circumstances and the nature of the thing mortgaged.

Applying those general principles to a mortgagee in possession of an agricultural estate:—

A mortgagee in possession of an agricultural estate is liable for his gross negligence in regard to cultivation.

Hailsham Vol. 23 p. 373 para 555. *Wragg* v *Denham*[26]. *Wragg* v *Denham* was a case of mis-feasance. But the same applies to non-feasance. It is not necessary that there should be permanent damage or deterioration in order to make the mortgagee liable. A mortgagee going into possession of a rubber estate who entirely neglects it commits a breach of duty in not cultivating and controlling it. *Woon Foon Hoh* v *Muthiah Chetty*[27].

That case was decided 6 years ago and, so far as I know, has never been questioned. It should be

observed that (1) it can be deduced with virtual certainty from the facts reported that interest was in arrear and must have exceeded the rents and profits, but that was not held to be an excuse; and (2) abandonment of cultivation and of control was held to be a breach of a *duty* for which the mortgagee was liable. Therefore, to effect a minimum of cultivation and control is a *duty* laid upon a mortgagee in possession of a rubber estate, and not merely a right as Braddell argued.

If it were correct, as argued for the Appellant, that the mortgagee is excused if his interest in arrear exceeds the income, then whenever interest is in arrear, a mortgagee of a rubber estate can take possession, cease to tap and cease to maintain, so that the rents and profits can never exceed the interest, and that circumstance alone will afford him a complete excuse, while the debt piles up and the estate goes back to jungle.

The remaining authorities dealing with agricultural estates appear to be: *Coote* 8th edition p. 931. *Rowe v Walker*[20]. *Oxenham v Ellis*[18A].

I submit that result of all the authorities which specifically deal with mortagees in possession of agricuatural estates is to support the direction of the Court of Appeal that a minimum of care and cultivation is necessary.

I go on to consider the cases on repairs to houses under protest, having regard to the clear direction of the Court of Appeal that it must be remembered that this is not such a case. The Appellant does not allege in his Grounds of Appeal that that part of the judgment is *obiter*.

The proposition in *Coote* 9th edition p. 830 goes beyond the authority cited which is *Richards* v *Morgan*[20]. *Fisher* 17th edition p. 728 is careful only to copy the exact words. I suggest that the passage in *Hailsham* 23 p.372 para. 552 is correct. A Mortagee in possession of house property "must—*at any rate* to the extent of the surplus rents in his hands after the interest due on his mortgage is satisfied—do such repair etc." This is his minimum liability. It does not say that in no case must he do more. And it does not apply to a mortgagee in possession of an agricultural estates.

The cases cited by Braddell on a mortgagee improving the property have no application. (He referred to *Sandon* v *Hooper, Tipton* v *Tipton, Henderson v Astwood supra.*) We have not asked for improvement.

I do not deny that a mortgagee should be diligent in keeping down the debt.

Quarrel v *Beckford*[43] at p. 100.

Meyer v *Murray*[15] at pp. 424, 428.

But it is not diligent to neglect the property to such an extent that it can no longer be classed as a rubber estate and thereby to lose the opportunity of reducing the debt by thousands of dollars.

I do not suggest that the mortgagee is an assurer of the continuance of the same rate of profit as the mortgagor got. (*Shah Mukhan Lall* v *Baboo Sree Kishen Singh*[46]). I do suggest that he must be reasonably diligent.

The cases *Bompas* v *King*[4] and *Russell* v *Smithies*[44] are distinguished and of no assistance.

County of Glouster Bank v Rudry[31] at p. 629 shows that the right to work a business passes to a mortgagee taking possession as of course.

As to Issue No. (4). I do not dispute the principle that the mortgagor cannot stand by and complain afterwards. *Millet v Davy*[16]. *Hughes v Williams*[10]. But the Respondent did not, in fact, stand by. The allegation that he stood by is an after thought. It is not pleaded and should have been, if it was going to be set up. (Counsel dealt at length with the evidence and the correspondence in support of his contention that the Resuondent did not stand by).

Braddell in reply:

The respondent in this Court has repeated the arguments before Terrell, J. The main submission can be stated in a simple syllogism. There was a duty upon the appellant to exercise a minimum of care and cultivation. The appellant did nothing. Therefore he was guilty of gross negligence. That is an accurate statement of the Judgment of Terrell, J.A. and of O'Connor's argument. That I submit is logically insupportable, because the conclusion is a *non sequitur*. I will show you that the Court of Appeal has not concluded the matter even if you accept that statement of the law. I opened this Appeal on the footing that all that had been and would be claimed for that passage as to minimum of care and cultivation was that it was binding upon Terrell, J.A. and the Registrar. But O'Connor's argument in this Court is

that the decision is *res judicata* and therefore right or wrong there had been a decision and the parties are estopped. There is a complete difference between a binding statement of the law and a statement which is *res judicata.* In the earlier stages of these proceedings none of the advisors of the respondent set it up as *res judicata.* They merely supported it as a correct statement of the Law and their opponents attacked it. Even Terrell, J.A. did not say that the parties were estopped. He merely said he was bound by it and so was the Registrar. Now that *res judicata* is claimed for that passage I restate the questions for decision as follows:—

1. Is the statement by the Court of Appeal as to the duty to exercise a certain minimum of care and cultivation binding?
2. If not, does this Court agree with it or not?
3. If there is such a duty, has the appellant been guilty of gross negligence in not performing it?

As to 1, it was said: "You can go behind the decree to the judgment". The local Sections on judgments are a departure from the Indian Code and are more closely related to the English form of judgments. In English Law you cannot go behind a decree to the grounds of the judgment. The decree in this case is drawn up like an English judgment. If any special directions are given they are given by means of a declaration. See the forms in *Seton.* There is no such declaration in this decree. The very manner in which Terrell, J.A. introduced that—passage in this judgment shows that he was merely stating a fact after pronouncing judgment. It is now claimed that he was also finding the Law.

To find what a case decides you can only look at the judgment, pleadings and the course of argument, not the judge's reasons.

Spencer Bower on *Res Judicata* pp. 102–3 and p. 113.

13 *Hailsham,* 443, Note (1).

In re Bank of Hindustan, China & Japan Alison's case, Mellish, L.J.[30].

Ballantyne v. Mackinnon,[29].

The King v. Governor of His Majesty's Prison. Brixton,—Ex parte Savarkar,[22] at pp. 1071–72, 1077–78.

Jones v. Lewis,[12].

We can only look at the decree. On the decree the counter-claim is dismissed. Therefore the Court has found against mismanagement and neglect. It then proceeds to direct the Registrar to find facts and law, not merely damages. Such a thing has been done before. The Six Widows case.

It is therefore wrong to contend that the law on this case was not open.

With regard to a mortgagee's rights and duties I emphasize that this is not a mortgage at all. Such a thing would be illegal.

Haji Abdul Rahman v. Mohamed Hassan,[9].

But I claim that this transaction is analogous to a mortgage. It is for this Court to decide how much of the principles of the law of mortgage can be applied to such a transaction. According to the Privy Council in *Haji Abdul Rahman v. Mohamed Hassan*[9] the rights of parties are *ex contractu* only. Also here the respondent is in breach of contract. *Tan Ah Boon's case*[48].

It is essential to bear in mind that the rights in this case arise in contract. But it has been and is my case that the transaction being analogous to that of a mortgage you can apply the principles governing that relation to this transaction in so far as they are applicable. It is the principles that can be gathered from the cases and not the cases themselves that can govern this transaction. By reference to those cases I extract the following principles.

It is the mortgagee's first duty to keep down principal and interest.

Quarrell v. Beckford,[43].

He will be liable on the footing of wilful default without proof of even one instance of it.

The mortgagee is not an assurer of the income.

Shah Mukhun Lall v. Baboo Sree Kishen Singh[46].

The mortgagee must not engage in speculation and adventure but the mortgagor must afford his advice and aid.

Hughes v. Williams,[10].

Rowe v. Wood,[21].

Millet v. Davey,[16].

The mortgagee need only do such repairs as can be paid for from income after his interest had been met.

Richards v. Morgan,[20].

The Mortgagee has a limited right to improve and no duty to do so.

Sandon v. Hooper,(45).

Tipton v. Tipton,(49).

Henderson v. Astwood,(34).

If you look at this as a business, it is only a right not a duty to carry it on.

Bompas v. King,(4).

County of Gloucester Bank v. Rudry,(31).

I emphasized you must distinguish between rights and duties. *Fisher* says so and *Hailsham.* If you look at this case in the only two ways it is possible either as repairs or as improvements; There never was a duty to repair unless there was a surplus income after paying interest: but there was no duty to improve at all. A Mortgagee cannot improve a Mortgagor out of his property.

O'Connor has dealt with my cases not with my principles. The real duty put against me is a duty to maintain. But my first duty on the authorities is to keep down the debt. If you agree with the authorities then the absolute principle of minimum of care and cultivation cannot be right.

As to my third proposition, if there was such a duty then, I say I am not grossly negligent merely because I have not performed it. Because you must look at all the circumstances of the case.

(Counsel then referred to the evidence and the accounts).

The counter-claim having been dismissed the only claim before the Court is a claim for surcharges on the accounts. There is nothing else. That claim is based on a duty that is put against me which in the last resort is a duty to tap. No question of depreciation of the property. It is said we did not get an assessment; we ought to have got it. The real complaint is that we did not go in and tap blocks C & D. On that it is material to consider how was I to tap and with whose funds. The salient facts established by the evidence are:—

1. From April 1931 no weeding had been done to any of the estates,
2. When he went to Ceylon the respondent owed the appellant $43,000.00,
3. While he was in Ceylon the appellant went into possession,
4. The letters show that the respondent put the duty of maintenance upon himself, not on the appellant.
5. On 1.12.32 he asked for one year's extension and obtains it.
6. He comes back to this country in March 1933 and makes no complaint at all until January 1934.
7. All that time nothing had been or was being done to blocks C and D. At the end of 1933 he asks for two years' time.

On those facts I ask is it suggested that I should have been weeding these estates the whole of this time and tapped the same? During the whole of the time from March 1933 the respondent and his co-adventurers were in the country, were familiar with the conditions of the estates, knew the vital fact of Restriction having come in. But they never spoke one word to the appellant nor asked him to do a single thing. How is it possible to say in spite of all this that the appellant was negligent in not having cleaned the estates or tapped them.

O'Connor was heard in reply to *Braddell's* new cases from *Spencer Bower.*

Cur. Adv. Vult.

Poyser, C.J.—This is an appeal against the judgment of Terrell J. setting aside a certificate of the Registrar dated the 25th of October 1938. There has been a great deal of litigation between the parties in the past, and it is necessary for the purposes of this appeal to refer to the circumstances leading up to it.

The respondent, Seenivasagam, is a retired Government servant; he was placed on pension in 1932. In 1917 he commenced to speculate in rubber lands, and purchased Simpali estate which he subsequently put in his wife's name. In 1927 he purchased, in partnership with two other Government servants, the estate known as Bentong estate. The appellant financed this purchase and, in accordance with local custom, was registered as the owner, giving the usual undertaking that he would convey to Seenivasagam and his partners when the principal and interest due to him had been paid.

Mr. Braddell in opening informed us that such a transaction was known in the F.M.S. as a nonstatutory mortgage, but he subsequently, after referring to a Privy Council decision, stated that such a transaction was not a mortgage but only analogous to one, and the rights of the parties were merely contractual.

In 1929 the respondent purchased Karak estate, and in 1930 Cheroh estate, by similar means. This appeal concerns only Cheroh estate.

Up to 1931 Seenivasagam paid some interest to the appellant, but after that did not pay any, and on the 2nd of January 1932 owed the appellant about $43,000 in respect of principal and interest. In that month Seenivasagam went to Ceylon and soon afterwards, in February, the appellant took possession of all the estates registered in his name.

In 1934 litigation commenced, four suits being instituted by the appellant, which were by consent heard together. We are only concerned with one of those suits, viz: Bentong Civil Suit No. 7 of 1934 in respect of Bentong and Cheroh estates.

In his plaint the appellant claimed from Seenivasagam and others an account and a declaration that he had a lien or charge over the lands described in the schedule to the plaint for such amount as might be found due to him. Seenivasagam pleaded that the appellant held the lands in trust for him and was wrongfully in possession of the same. He counterclaimed for the sum of $43,689.37 as damages for mismanagement and neglect.

Judgment in this and the other actions was entered on the 1st of February 1935 in favour of the defendants. The appellant appealed, the appeals were heard together, judgment being given on the 3rd of March 1936. The following passage in the judgment of Terrell J. (which was the majority judgment of the Court) must be considered for the purpose of this appeal:—

> "The position of the plaintiff is that he went into possession of estate in which the defendants had an equitable interest. In my opinion he was entitled so to do, but it is quite another matter whether in so doing he was wise. On entering into possession he at once took upon himself certain liabilities. The case of **Wragg v. Denham,** 160 E.R. 335, shows that a mortgagee in possession is chargeable with gross negligence, and in the circumstances of the present case I consider that the plaintiff should account on the footing of wilful default and be similarly chargeable. It must be remembered that this is not a case where houses have been allowed to fall into disrepair because there was no money to repair them. The plaintiff was in possession of an agricultural estate and clearly was not entitled merely to take the profits from the rubber, and allow the estate to go to wreck and ruin. Without making the plaintiff responsible for keeping up the estate to the highest possible standard, a certain minimum of care and cultivation was clearly necessary. It must be a matter of enquiry as to whether any or which acts or omissions by the plaintiff constituted such gross negligence as to make the plaintiff accountable therefor. I would accordingly set aside the orders to account made against the plaintiff in Suits 2 of 1934 and 7 of 1934, and direct accounts on the footing of wilful default and enquiries as to the plaintiff's gross negligence while in possession of the three estates, other than Simpali. Upon such enquiries the evidence taken at the trial should be admissible, but the findings of the learned trial Judge cannot be regarded as conclusive, because in the Court below the plaintiff was treated as a trespasser, and in cases of trespass the measure of damages is the depreciated value of the property; whereas in cases of gross negligence, the plaintiff would only be liable for the acts and omissions actually proved against him, irrespective of the extent to which the property had depreciated. Again the plaintiff would be prejudiced if the learned Judge's findings of fact were accepted, even so far as they were relevant, as an appeal was lodged against such findings, and it was only because the defendants never asked for the alternative relief which this Court considers appropriate, that this part of the appeal was never argued."

It is the sentence "a certain minimum of care and cultivation was clearly necessary" that causes the principal difficulty in this case. The decree contained no reference to 'minimum care and cultivation'. The following are the material extracts from it:—

> "AND it is ordered that an account be taken by the Registrar on the footing of wilful default of all moneys received by the plaintiff from the sale of rubber harvested from the lands comprised in the documents of title specified hereunder etc."

> "AND it is ordered that an enquiry be had by the Registrar as to whether any or which acts or omissions by the plaintiff while in possession of the said lands constituted such gross negligence as to make the plaintiff accountable therefor to the defendants firstly and fourthly above-named and as to the amount if any for which the plaintiff should account to the defendant firstly above-named and to the defendants fourthly above-named respectively."

This decree, it should be stated, was settled by Terrell J. after hearing counsel for all parties.

The Registrar held the enquiry and finally found that the defendants had been over-charged to an extent of $468.06, but he awarded nothing in respect of wilful default or gross negligence in respect of any of the estates the plaintiff had taken possession of.

His findings were accepted as regards Karak and Bentong estates entirely, but as regards Blocks 'C' and 'D' of Cheroh the defendants appealed. Terrell, J. allowed the appeal and ordered:—

> "THAT the matter be referred back to the Registrar to assess the damages if any due to failure on the part of the respondent to maintain and cultivate Block 'C' area 45 acres and Block 'D' area 160 acres or thereabouts of Cheroh estate and also to assess the consequential damages under Surcharges 9D, 10B, 10C, and 10D, referred to in paragraphs 9 and 10 of the affidavit of Sinnathamby Seenivasagam dated the 17th day of September 1936."

The surcharges referred to (as set out in the brown book) are as follows:—

9D—Cheroh estate, Block 'C':—
Loss through not tapping for 1933-34.

10B—Cheroh estate, Block 'D':—
Loss through not tapping 1933 and first five months of 1934.

10C—Cheroh estate, Block 'D':—
1934 last 7 months—loss through not tapping and obtaining assessment.

10D—Cheroh estate, Block 'D':—
1935 first 9 months—loss through not tapping and obtaining assessment.

The amount claimed on these surcharges is about $5,000, but I assume that as a very large sum must have been due to the plaintiff in 1936 in respect of interest, what is of far more importance to the parties is the question of costs.

Mr. Braddell in his opening address put the issues we had to decide as follows:—

1. Did the Court of Appeal direct that it was the duty of the appellant to exercise a minimum of care and cultivation?
2. If so, was that direction **obiter dictum**, and so not binding on Registrar and Terrell, J.?
3. If not **obiter dictum**, was direction correct in point of law?
4. Did respondent stand by so as to lose any remedy he might otherwise have had?

1 and 2 can be conveniently dealt with together. I do not think, with considerable hesitation I must admit, that the sentence "a certain minimum of care and cultivation was clearly necessary" can be regarded as 'obiter'. Terrell J. was, in the passage of the judgment in which this sentence occurs, dealing with the plaintiff's possession of the defendant's estates, and his consequent liabilities. It was not a casual expression of opinion upon a point that was not raised in the case, see *Slack v. Leeds Industrial Co-operative Society Ltd.*[24]. Although this sentence cannot, in my opinion, be regarded as an *obiter dictum,* it is very difficult to ascertain what was meant by it. The appellant admittedly neither tapped nor weeded Blocks 'C2' and 'D' during his possession, but did the Court of Appeal lay down that gross negligence in respect of those Blocks was thereby established? Presumably not, for all the facts were before them, and if they had, the Decree would have directed the Registrar to assess the damages in regard to those Blocks, and only to enquire whether there was gross negligence or not in regard to the other blocks and other estates. This sentence, I think, must have been intended to apply to all the estates and not to a particular block or blocks of one estate.

Further, it appears from the notes of the argument in the Court of Appeal that the argument on behalf of the plaintiff was—"I am not a trespasser, my position is analogous to that of a mortgagee in possession, and therefore I am only liable for gross negligence, and that is a matter for subsequent enquiry". This argument the Court of Appeal adopted.

A number of cases were cited to us in regard to whether we should look only at the decree in order to find out what the Court of Appeal decided, or whether we could also look at the judgment. It was argued that we must follow English law, and if we did, only the decree and pleadings could be looked into. In support of that argument Spencer-Bower on *Res Judicata* was cited, as well as various reported cases, including *Jones v. Lewis,*[12] and *R. v. Governor of Brixton*[22].

From these authorities it would appear that in England only the formal record of the judgment, and such pleadings and other proceedings, if any, as show what particular question of law or fact must necessarily have been determined, can be examined. On the other hand, our Civil Procedure Code is based on the Indian Code, and the Privy Council have held in *Kali Krishna Tagore v. The Secretary of State for India,*[13] that under such Code:—

> "To apply the law of estoppel by judgment....it must be seen what has been directly and substantially in issue in the suit, and whether that has been heard and finally decided, for which purpose the judgment must be looked at. The Decree is usually insufficient for showing this, as, according to the Code, it only states the relief granted, if any, or other disposal of the suit, without the ground of decision, and without affording information as to what may have been in issue and decided."

I think we must follow the Indian case, and therefore cannot look at the decree alone to ascertain what the Court of Appeal did decide. As stated before, I come to this conclusion with considerable hesitation, for I do not think the Court held, as Terrell J. now finds, that the failure to cultivate a particular block was *ipso facto* gross negligence. Mr. Braddell stated that if they had considered the Court of Appeal to decide that, there would have been an appeal to the Privy Council.

It therefore follows that the Registrar in holding his enquiry, had to bear in mind, as in fact he did, that a minimum of care and cultivation of the estates as a whole by the plaintiff was necessary.

This disposes of the first two issues previously referred to. I will now deal with the third issue—'if

not *obiter dictum,* was direction correct in point of law'. This issue, I think, can be very shortly answered as follows. Whether it was correct or not, this Court cannot in these proceedings say that it was an incorrect direction. I am not prepared to hold that this Court is bound by its own prior decisions. It is, however, unnecessary for me to express a definite opinion on this point. In England there seems to be a divergence of opinion, for in the case of *re Shoesmith,*[23] the Court of Appeal assumed that it was not bound by its own prior judgments, and Greer L.J. stated in the course of his judgment:—

> "I wish to repeat what I said in the course of the argument, that the Court has more than once, sitting as a Court with all its six members, decided that it can over-rule a decision of the Court of Appeal which has held the field for a number of years. If the Court of Appeal, sitting with its six members, can do so, equally a Court sitting with a quorum of members can do the same thing. Although as a matter of courtesy and of usual practice, this Court deems it right to follow its own decision in earlier cases, there is no rule of law which compels it to do so."

A similar view was expressed by Slesser, L.J. A contrary view was, however, taken by another division of the Court of Appeal in *Adair & Co. v. Birnbaum,*[1] where the Court held that it must follow one of its previous decisions, although it clearly disapproved of such decision.

This case, however, is not a question of whether this Court is bound by one of its prior decisions; the question is whether in proceedings which are the sequel to a decision of the Court of Appeal, we can hold such decision to be wrong. In my opinion we clearly cannot, and if it is necessary to cite any authority for this proposition, the case of *Preston Banking Co., v. William Allsup & Sons,*[2] may be referred to. It was there held that a Court has no jurisdiction to rehear or alter an order after it has been passed and entered, provided that it accurately expresses the intention of the Court. We, therefore, cannot in these proceedings hold the direction of the Court of Appeal to be wrong, although in view of what I have previously stated, I do not consider such direction to be necessarily binding on future Courts of Appeal in similar cases.

I now come to what is, in my opinion, the most important part of the case, viz: the fourth issue propounded by Mr. Braddell, and to consider whether the Registrar's finding in favour of the appellant on the issue of wilful default and gross negligence was correct or not. The following facts are material. Cheroh estate, which was acquired by Seenivasagam in 1929, consists of four blocks, viz:—

Block 'A'— 9 acres.
„ 'B'— 17 „
„ 'C'— 44 „
„ 'D'—160 „

Block 'C' was planted with rubber in 1927 and Block, 'D' in 1928. From April 1931 both 'C' and 'D' Blocks were neglected. The finding of Burton J. on this point, which the Registrar accepted, is:—

> "That they had already to some extent been neglected in February 1932 when the plaintiff went into possession."

Seenivasagam went to Ceylon in January 1932, owing the plaintiff a total of $43,000. On the 16th of September 1932 the plaintiff was threatening to sue (page 809 of yellow book). On the 1st of December 1932 Seenivasagam asked for a year's extension (page 841 yellow book), and this was granted. In April 1932 the respondent wrote to the appellant (page 802 of yellow book) requesting him not to do any tapping. During 1932 and 1933 interest was accumulating, and at the end of 1933 was in arrears to the extent of $9,162.96.

Seenivasagam returned to Malaya in 1933. He borrowed $90 from the plaintiff to do some weeding on Block 'C', but there was no evidence that from February 1932 to January 1934 Seenivasagam asked the plaintiff to tap any area other than the ones he was tapping, nor did he request any weeding to be done. Block 'C' became tappable in 1933 but was not tapped. In 1934, however, an assessment from the Controller of Rubber was obtained in respect of this block. Block 'D' became tappable at the end of 1933 but was never tapped, and did not receive any assessment until the Receiver went into possession. It was not in dispute that at no period of the plaintiff's possession of those estates did the income suffice to pay the interest due to him, and as regards Cheroh estate the surplus of income over expenditure was at the end of October 1935 only $541, but for a considerable period after the plaintiff went into possession, the income was not sufficient to meet expenditure.

The Registrar found, as regards Block 'C', that there had been some effort to control the growth of 'blukar' and a certain amount of maintenance work, and the evidence supports this finding. As regards Block 'D' he found that there was no gross negligence, but that the plaintiff "would be liable on a hypothetical surcharge if he had no excuse". This excuse he found

was provided by Seenivasagam's instructions not to tap, such instructions never being rescinded.

It appears to have been conceded in the argument before Terrell J. that the trees on Blocks 'C' and 'D' were in no way damaged by lack of care and maintenance, but he held that, in view of the words of his own judgment, some maintenance and cultivation were necessary whether there was money available or not, and if there had been such care and maintenance, an assessment could have been obtained for Block 'D', and therefore a *prima facie* case of gross negligence was established.

In the course of the argument a number of English cases were cited to us in regard to what were the rights and liabilities of a mortgagee in possession. These authorities were of little assistance to us, as they mostly concerned a mortgagee in possession of buildings or factories, and not of agricultural land, e.g. such cases that established in England that a mortgagee need only do such repairs to or maintenance of buildings as can be paid for after the interest on the mortgage debt has been paid, that the mortgagee should not increase the mortgage debt, "improve the mortgagor out of his estate" or spend his own money on improvements or repairs. Further, *Wragg v. Denham,*[26] which was so frequently referred to, established that bad husbandry might be gross negligence; but if it was gross negligence to grow three crops in succession on an English field, it does not follow that non-tapping of rubber trees in Malaya is gross negligence.

There is, however, one principle of English law which I think can be regarded as reasonably applicable to this case. That principle is that where the mortgagee has gone into possession, it is the duty of the mortgagor to afford him advice and aid for the purpose of making the estate as productive as possible; he cannot stand by and complain afterwards, see *Hughes v. Williams,*[10]. In this case, having regard to the facts, such principle becomes of great importance.

I do not think that it is necessary that I should refer any more to the various points of law that were raised in the argument, and it only remains to consider whether the Registrar was, on the facts, justified in holding that the plaintiff was not accountable for wilful default or gross negligence. In my opinion the Registrar was so justified. Terrell J. in reversing the Registrar appears to have done so principally on the ground that as there was admittedly no cultivation of Blocks C2 and D during the plaintiff's possession, a *prima facie* case of gross negligence was thereby established. The Court of Appeal decree, however, directed an enquiry into the plaintiff's gross negligence while in possession of three estates and 'the minimum of care and cultivation' must be held to apply to such three estates generally and not only to a part of one estate. If that is the case, there undoubtedly was more than a minimum of care and cultivation of the estates as a whole, and it only remains to consider whether the non-cultivation of Block 'C2' and 'D' constituted gross negligence.

Taking the following circumstances into account, I do not think the plaintiff's acts and omissions constitute such gross default or mismanagement as to make him accountable therefor.

(a) In 1932, when the price of rubber was very low, Seenivasagam asked the plaintiff not to tap. Prices did improve later, but no request to weed or tap Blocks 'C2' and 'D' was ever made, and allegations of neglect of the estates were not made till proceedings were pending and negotiations for a settlement had failed.

(b) Complaint was made that owing to the plaintiff adopting the 'bagi dua' system the trees were injured; Seenivasagam, however, instituted that system, and the plaintiff only continued it.

(c) During 1933 Cheroh estate was being bored for gold. On the 19th of January 1933 Seenivasagam wrote to the plaintiff (page 820 of yellow book) referring to the "glad tidings of the hidden treasure", and asked the plaintiff "to stand firm for $1,000 per acre". It is therefore not surprising that the plaintiff did not cultivate Blocks 'C2' and 'D' during 1933.

(d) The plaintiff appears to have been willing to clear and tap Block 'D', if Seenivasagam would provide the money to do so. As the arrears of interest were increasing during the whole of his possession, it does not appear to be unreasonable or grossly negligent for the plaintiff to have refused to spend his own money.

(e) Rubber trees may suffer injury through over-tapping but not through under-tapping or not being tapped at all. Further, 'clean-weeding' is no longer considered good cultivation. Modern planting, we were told,

provides for 'controlled forestry' on rubber estates, i.e. a controlled growth of other trees in addition to rubber trees.

(f) After proceedings were instituted I do not think it can be held to be gross negligence that there was no cultivation on those two blocks. The plaintiff had to meet a claim that he was a trespasser, and a consequential claim for damages.

Taking all these facts into account and the principles I have previously referred to, I think the Registrar came to a correct conclusion. As stated before, the difficulty arose in this case owing to the somewhat vague direction, assuming it to be a direction, of the Court of Appeal "a minimum of care and cultivation", and the fact that in the decree no reference was made to such direction.

For the above reasons I would allow the appeal with costs, and grant a certificate for two counsel.

McElwaine, C.J. (S.S.)—This is an appeal from an order of Terrell J. setting aside the Registrar's Certificate.

In the year 1927 the respondent and others desired to acquire certain lands for which they were unable to pay. It was arranged that the appellant should provide the purchase price and take a registered title in his own name and give a conveyance to the respondent and his associates when they discharged the purchase price with interest.

The relationship between the appellant and respondent was not in law that of Mortgagor and Mortgagee (*Haji Abdul Rahman* v. *Mohamed Hassan*[9]) but the case was argued on the basis that the liability of the appellant to the respondent was the same as the liability of a mortgagee in possession to a mortgagor.

Principal and interest being in arrear the appellant entered into possession of the land in February 1932, and in 1934 commenced an action alleging that he held the lands in trust and claiming, *inter alia,* an account and a declaration that he had a lien or charge over the lands for such amount as might be found due to him.

The respondent counterclaimed for damages giving the following particulars:—

(a) The Plaintiff allowed the whole area of the said lands to get covered with blukar and lalang to such an extent that much of it is difficult to tap properly and it will entail considerable expense to clean the said lands.

(b) The tapping during the Plaintiff's possession has been bad and there has been much over-tapping of high-yielding trees and many trees have been badly wounded.

(c) The Plaintiff has not managed the estate efficiently and tapped it properly or to the best advantage. This Defendant claims as damages in respect of the above a sum of $150.00 per acre for the whole area of 291 acres 1 rood 2 poles i.e. $43,689.37.

and asked for possession, for a declaration that the plaintiff held the lands as trustee and for payment of whatever sum might be found due to him by the appellant on the taking of accounts.

In his reply the appellant pleaded.

"The Plaintiff alleges that it was the intention both of the Defendants and of the Plaintiff that the said lands, more particularly described in the Schedule to the statement of Plaint should be put into the name of the Plaintiff so that he should have security for all moneys owed by the defendants to the plaintiff and that it is not competent for the defendants to seek or obtain a declaration that the plaintiff is a Trustee for the defendants firstly and fourthly abovenamed of the said lands, so as to deprive the plaintiff of his security."

The action and three others were tried together before Burton J. and an order was made on the 10th August, 1935, in which, among other things, accounts were ordered and $6,900 damages were awarded to the respondent.

Murugappa appealed against the award of damages and against some other portions of the Judgment of Burton J. and on the 3rd April, 1936, the Court of Appeal ((1936) F.M.S.L.R. 33) allowed the appeal and dismissed the counterclaim and an order was made in which the following passages are material:—

"It is ordered that an account be taken by the Registrar on the footing of wilful default of all the moneys received by the plaintiff from the sale of rubber harvested from the lands in question which included two blocks known as Cheroh C and Cheroh D with which alone this appeal is concerned."

The order proceeded:—

"And it is ordered that an inquiry be had by the Registrar as to whether any and or which acts or omissions by the plaintiff while in possession of the said lands constituted such gross negligence as to make the plaintiff accountable therefor."

"And it is ordered that upon such inquiry the evidence recorded by Burton, J. be admissible but that his findings shall not be binding."

Pursuant to this Order an inquiry was held by the Registrar before whom the respondent filed two documents:—

(1) Particulars of heads under which damages for gross negligence are claimed (white Book p. 59). All of those particulars with which this appeal is concerned allege gross negligence in

reconditioning blocks C and D of Cheroh. "Reconditioning" was explained as meaning failure to maintain.

(2) Surcharges.

The Registrar found that the appellant was not grossly negligent and that there was no wilful default on his part and he gave a certificate that the appellant Murugappa had overcharged the respondent Seenivasagam to the extent of $468.06.

Seenivasagam moved Terrell J. to set aside the Registrar's Certificate alleging that $2,764.20 should have been allowed as damages for gross negligence in failing to maintain blocks C and D of Cheroh and that four surcharges

9 d.	$ 137.50
10 b.	666.66
10 c.	1,633.33
10 d.	2,460.00
	$4,897.49

should have been allowed for wilful default in not harvesting the amount of rubber which the respondent alleged the appellant should have harvested after he had entered into possession of the Cheroh land.

On hearing the motion Terrell J. set aside the Registrar's Certificate and referred the matter back to the Registrar to assess the damages, if any, due to failure on the part of Murugappa to maintain and cultivate blocks C and D of Cheroh and also to assess consequential damages under surcharges 9 d, 10 b, 10 c and 10 d.

From this judgment the present appeal is brought.

In the course of his judgment in the Court of Appeal from the decision of Burton J. Terrell J. (with whom Howes J. concurred) said[17].

> "It must, however, be recognised that on the learned Judge's findings of fact, the plaintiff was guilty of mismanagement and neglect while in possession of the estates, and, if they had framed their claim in a proper way, the defendants would certainly have been entitled to some relief. The position of the plaintiff is that he went into possession of estate in which the defendants had an equitable interest. In my opinion he was entitled so to do, but it is quite another matter whether in so doing he was wise. On entering into possession he at once took upon himself certain liabilities. The case of **Wragg v. Denham** shows that a mortgagee in possession is chargeable with gross negligence, and in the circumstances of the present case I consider that the plaintiff should account on the footing of wilful default and be similarly chargeable. It must be remembered that this is not a case where houses have been allowed to fall into disrepair because there was no money to repair them. The plaintiff was in possession of an agricultural estate and clearly was not entitled merely to take the profits from the rubber, and allow the estate to go to wreck and ruin. Without making the plaintiff responsible for keeping up the estate to the highest possible standard, a certain minimum of care and cultivation was clearly necessary. It must be a matter of inquiry as to whether any or which acts or omissions by the plaintiff constituted such gross negligence as to make the plaintiff accountable therefor. I would accordingly set aside the orders to account made against the plaintiff in Suits 2 of 1934 and 7 of 1934, and direct accounts on the footing of wilful default, and inquiries as to the plaintiff's gross negligence while in possession of the three estates, other than Simpali. Upon such inquiries the evidence taken at the trial should be admissible, but the findings of the learned trial Judge cannot be regarded as conclusive, because in the Court below the plaintiff was treated as a trespasser, and in cases of trespass the measure of damages is the depreciated value of the property; whereas in cases of gross negligence, the plaintiff would only be liable for the acts and omissions actually proved against him, irrespective of the extent to which the property had depreciated. Again, the plaintiff would be prejudiced if the learned Judge's findings of fact were accepted, even so far as they were relevant, as an appeal was lodged against such findings, and it was only because the defendants never asked for the alternative relief which this Court considers appropriate, that this part of the appeal was never argued."

Mr. Braddell, in opening the present appeal, formulated four questions:—

1. Did the Court of Appeal direct that it was the duty of the appellant to exercise a minimum of care and cultivation?
2. If so, was that direction **obiter dictum** and so not binding on the Registrar and on Terrell, J.?
3. If it was not **obiter dictum** was the direction correct in point of law?
4. Did the respondent stand by so as to lose any remedy which he might otherwise have had?

During the argument Mr. Braddell admitted that if the passage "a certain minimum of care and cultivation was clearly necessary" was not an *obiter dictum*, the present Court of Appeal would be bound by it as it would be a binding statement of law made in this very suit. We are not therefore called upon to decide the interesting question as to whether the Court of Appeal is bound by a previous decision of the Court of Appeal. I pass from that point with this observation that if a Court of Appeal decides a point of law upon which a governing enactment or a decision of the Privy Council or the Court of Appeal bearing directly on the point existed but was not brought to the notice of the Court of Appeal, a subsequent Court of Appeal may well have to consider whether it must regard its earlier decision as binding upon it.

In his reply Mr. Braddell restated his questions as follows:—

1. "Is the statement of the Court of Appeal as to the duty to exercise minimum care and cultivation binding?" This I take to mean is the statement part of the **ratio decidendi**?

2. "If not, does this Court agree with it or not?"

3. "If there is such a duty has the appellant been guilty of gross negligence in not performing it?"

In my opinion the Court of Appeal enunciated as a principle of law that if a person who takes a title to an estate in his own name with a contractual obligation to convey it to a person when that person has repaid to him the purchase price and interest, the latter person being in the meantime permitted to have possession of the land then in that case if the person who is the registered owner enters into possession of the estate on the default of the other party, there is a legal duty on the registered owner to take a minimum of care of the estate and to do a minimum of cultivation upon it.

Such a statement of law may be regarded in three ways (a) as an actual decision on a point in issue in the case in which the statement was made which raises an estoppel as *res judicata;* (b) as part of the *ratio decidendi* and therefore an authoritative decision binding on Courts of first instance if not on the Court of Appeal itself; (c) as a mere *obiter dictum* deserving of respect but binding on no one.

Mr. O'Connor contends for the first view, Mr. Braddell for the third view.

I confess to finding some difficulty in ascertaining the exact status of this passage. The Court declined to consider whether on the evidence as a whole there was gross negligence and it therefore had before it no exact finding of any kind of negligence to which it could apply the impugned dictum.

But in the report of the case in 1936 F.M.S.L.R. at pages 36 and 37 setting out the argument of counsel, Mr. Hastings said "there was evidence of gross negligence on which this Court could uphold the decision", and Mr. Braddell is recorded as arguing "on gross negligence I have no case to meet."

We were provided with copies of the notes of argument made by Thomas C.J. and by Terrell J. from which it appears that after argument of certain legal points by Mr. Braddell Mr. Shearn started to argue that it is not gross negligence not to use money collected to pay one's own debt and that it was only surplus (if any) that was applicable to weeding. He was proceeding to argue that the evidence did not show gross negligence when he and Mr. Braddell decided not to pursue this matter subject to right of reply, if necessary, to Mr. Hastings. Mr. Hastings then proceeded to argue what is gross negligence. Having cited *Wragg* v. *Denham*[26] and *Richards* v. *Morgan*[20] Mr. Hastings said, according to the note made by Terrell J., "If he is in possession, he has to pay money out of his own pocket to maintain the estates". The argument then proceeded that Murugappa was a trustee, and to discuss some other points not now relevant. Mr. Braddell in reply said that as to gross negligence he had no case to meet.

The case was complicated by the defendant's uncertainty as to the real basis of his counterclaim. Before Burton J. it was suggested that the plaintiff was a trespasser and if he was not a trespasser, he was a trustee and if he was neither of these, he was a mortgagee or analogous to a mortgagee and the defendant's case was stated and restated several times. The final stand of the defendant at the trial is stated by Terrell, J. at page 61 of his judgment in the Court of Appeal.

It would be unfair to call these changes of front kite flying, but they undoubtedly rendered the case more complicated.

With considerable hesitation I have come to the conclusion that the passage about minimum care and cultivation is not part of the *ratio decidendi* because the Court did not find, taking the evidence as a whole, any particular state of facts to which to apply the legal proposition which it enunciated.

The Court of Appeal declined to consider whether there was gross negligence or not and in effect ordered a new trial on this point, saying "the plaintiff would be prejudiced if the learned Judge's findings of fact were accepted, even so far as they were relevant, as an appeal was lodged against such findings, and it was only because the defendants never asked for the alternative relief which this Court considers appropriate, that this part of the appeal was never argued".

"An opinion given in Court, if not necessary to the judgment given of record, but that it might have been as well given if no such, or a contrary, opinion had been broached is no judicial opinion, nor more than a *gratis dictum*". *Bole v. Horton,*[3]. I think Lord Halsbury meant very much the same thing when he put the converse case in his judgment in *Watts v. Assets Company*[25] "it is part of the law which is guiding his judgment, and part of the law he is bound to expound in the judgment he is pronouncing".

Applying these remarks to the present case, would it have made the slightest difference to the decision of the Court of Appeal if Terrell, J. had said that a

minimum of care and cultivation was *not* necessary? I think not. The Court was not over-ruling a contrary proposition of Burton, J.

It decided that the appellant was not liable as a trespasser but that he would be liable if he had been grossly negligent when in possession and as Burton, J. had not found that he was grossly negligent and as the Court of Appeal itself refused to consider whether gross negligence was established or not, it ordered a new trial on this issue when further evidence on the point could be called.

I therefore conclude that the phrase was not necessary to the decision and was therefore *obiter* and not binding on this Court.

Even *obiter dicta* may, when several Judges express the same view, have such a persuasive effect that they will be followed. See Lord Dunedin in *Nixon v. The Attorney-General*[18]. *Slack v. Leeds Industrial Co-operative Society*[24].

If the point were *res integra,* I would be inclined to agree with Terrell, J. that a mortgagee who goes into possession of mortgaged property such as a farm, a rubber estate or a factory which is producing the revenue with which the mortgage debt is to be discharged must take some steps to keep the property revenue-producing, and to prevent it falling into the decay which ordinary care would prevent.

But is that the law? A *dictum* of Terrell, J. with his wide experience of this branch of law is deserving of great respect, and that *dictum* he has amplified in his judgment now under appeal.

The case was argued before us on the basis that there is an absolute liability on a mortgagee in possession of agricultural land to maintain it irrespective of whether the rents and profits received by the mortgagee from the land is in excess of the interest due to him or not. Is it gross negligence for a mortgagee in possession not to spend his own money on the mortgaged property? Terrell, J. in his judgment now under appeal said:—

> "I do not think it is the law that a mortgagee in possession is only under an obligation to spend surplus income. If the Plaintiff had gone into possession when the rubber stumps had just been planted, and had then done no cultivation for 43 months, and if it is assumed that the blukar and lallang had grown as vigorously as they did when the trees were four years old, it is to my mind obvious that the rubber trees would have been entirely suppressed. In such a case I do not think that a mortgagee in possession could possibly maintain that he was not negligent when the whole of the rubber had been destroyed, merely because there was no income to provide for its cultivation. The fact that an estate is yielding no income is a cogent reason for not going into possession but if a mortgagee does so, and excludes the owner, he burdens himself with very definite obligations and will be guilty of negligence if he does not carry them out. The cases which decide that a mortgagee in possession of house property is not liable for repairs beyond the rent actually received by him have, to my mind, no application to a mortgagee who goes into possession of an agricultural estate?"

Mr. Braddell says that this passage is contrary to all authority, that the duties of a mortgagee in possession must not be confused with his rights and that there is no duty upon him to spend his own money in keeping the estate in repair, unless the title to the estate would be forfeited or lost if it were allowed to get into disrepair.

The question has two bearings, one on damages to the equity of redemption or, in the present case, to the estate in which the respondent has contractual rights; the other on whether the appellant could have received more profits from the estate and whether he should account for the profits he did not receive.

Fisher on Mortgages 7th Ed., p. 728 states the law thus:—

> "The Mortgagee in possession is not judged by the degree of care which a man is supposed to take of his own property. He need not rebuild ruinous premises, and he will not be charged with deterioration of the property arising from ordinary decay by lapse of time. But he will be allowed the cost of proper and necessary repairs and he ought to do such repairs as can be paid for out of the balance of the rents after his interest has been paid though he need not increase his debt by laying out large sums beyond the rents".

Coote on Mortgages 9th Ed. Vol. II p. 830 says:—

> "It is the duty of the Mortgagee in possession to keep the premises in necessary repair so far as the rents and profits in his hands will admit of. He will be held responsible for gross or wilful negligence in this respect, and an enquiry will be directed whether any deterioration has been occasioned thereby. A mortgagee is not, however, bound to spend his own money on repairs, and accordingly he will only be liable for neglect to repair to the extent of surplus rents and profits after providing for the interest to which he is entitled under the mortgage; and a mortgagee is not bound to lay out money on the estate except for necessary repairs."

Having stated that a mortgagee in possession shall not be permitted to waste the estate, *Coote* proceeds at page 831:—

> "A mortgagee in possession will be personally liable for wilful default if he be guilty of gross mismanagement in conducting a business, or in the cultivation of an estate".

23 *Hailsham*, section 552 says:—

> "He is chargeable in respect of gross negligence, and he must—at any rate to the extent of surplus rents in his hands after the interest due on his mortgage is satisfied—do such repairs as are required to maintain the premises in a proper state of preservation".

In *Godfrey v. Watson*[7] Lord Hardwick said:—

> "A mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair".

Mr. Braddell relied on *Richards v. Morgan*[20]:—

> "A mortgagee in possession ought to do such repairs as he can repay by the rents of the estate after his interest paid, but he need not rebuild or lay out large sums beyond the rent, for that would be to lend more principal money, upon, perhaps, a deficient security".

On the other hand Mr. O'Connor relied on *Wragg v. Denham*[26]:—

> "It is clear that a mortgagee ought not to be charged with deterioration arising in the ordinary way, by reason of houses and buildings of a perishable nature decaying by time, which was the case in **Anstruther**. There the mortgagee was in possession of the premises for forty years; and during so long a time the decay would naturally take place, even supposing the premises to be repaired in the meantime in the ordinary way. I think, also, that a mortgagee ought not to be charged exactly with the same degree of care as a man is supposed to take who keeps possession of his own property. But if there be gross negligence, by which the property is deteriorated in value, the mortgagee who is in possession is trustee for the mortgagor to that extent that he ought to be made responsible for that deterioration during the time of his possession. It is not necessary to go the length of shewing fraud in the mortgagee: gross negligence is sufficient".

In *Wragg v. Denham*[26] there was bad husbandry —the growing of successive crop on the same land and inadequacy of manning. This was held to be gross negligence.

Non-feasance can be gross negligence just as much as nisfeasance. "If such gross negligence can be shewn as comes up to the description of wilful default he (a mortgagee in possession) ought to be answerable for it". *Hughes v. Williams*[11].

It is not suggested that a mortgagee in possession is bound to improve the estate but it is said that he must preserve the *status quo* save as to natural deterioration caused by time.

In *Rowe v. Wood*[21] Lord Eldon asked:—

> "What is a mortgagee of a mine required to do, or what omission on his part will you call mismanagement?"

I think this implies that some omissions would be mismanagement. If a mortgagee goes into possession of a mine which is being worked or at least is being kept dry and he closes down work so that the mine becomes flooded, I should think that mismanagement. Lord Eldon goes on at page 556 "he must account not only for what he has made, but for what without his wilful default he might have made".

Again, in *Chaplin v. Young*[6] Romilly M.R. stated:—

> "In the case of a mortgagee of a business, if he enter into possession, he becomes the owner of the business, and he stands exactly, as regards his powers, in the place of the mortgagor, and, accordingly, he is accountable to the owner of the equity of redemption for everything which he either has received or might have received, or ought to have received, while he continued in possession".

He must not by his inertia let the business go to ruin.

In *Mayer v. Murray*[15] Jessel M.R., having enunciated a similar principle, proceeded to quote Turner, L.J.:—

> "A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and, the estate being, in the eye of the Court, a security only for the money, the Court requires him to be diligent in realising the amount which is due, in order that he may restore the estate to the mortgagor, who, in the view of this Court, is entitled to it".

One who goes into possession of a productive estate and uses no diligence in maintaining it so that he may recover his principal and interest but who allows it to become unworkable so that it can only be workable with considerable expenditure, commits, in my opinion, by his omission a breach of duty to the mortgagor.

Bompas v. King[4] referred to by Mr. Braddell turned on the mortgagees, entering into possession under a power of management and they carried on the same management precisely as it had been carried on before. There was no suggestion of negligence. They did exactly what they were authorised to do and they were allowed to charge losses not merely against the rents but against the surplus proceeds of the sale of the property.

When a mortgagee "once takes upon himself the burden which is imposed on all mortgagees who are in possession, he must continue to perform the duty, and he cannot, when he pleases, elect to give it up". *In re Prytherch*[19] and it appears to me he cannot elect to do nothing and allow an estate go to wreck and ruin. Why should he want to give up possession if he can lawfully sit still and do nothing?

Absence of ordinary care is gross negligence. "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees and it is more correct to define the degree of care than the degree of negligence". Montague Smith, J. in *Grill v. General Iron Screw Collier Company*[8].

In *Woon Foon Hok v. Muthiah Chetty*[27] a chargee who went into possession but did not cultivate or in any way control the property was held to have committed a breach of duty to the chargor.

There is no doubt on the authority of *Richards v. Morgan*[20] that a mortgagee going into possession of a derelict house is not bound to rebuild it but this is very different from saying that a mortgagee going into possession of a house in good repair need do no minor repairs the accumulated effect of the lack of which may well be that a valuable house in a few years of such possession becomes worthless.

For these reasons I think the *dictum* of the Court of Appeal is right and that a mortgagee going into possession of productive mortgaged property cannot sit still and do nothing, permitting the property to return to jungle. But in the view I take of Mr. Braddell's last point this opinion is probably itself *obiter,* but the point was so much argued that I thought it right to express some opinion upon it.

Mr. Braddell argued that as the formal order of the Court of Appeal dismissed the counterclaim, the Court must be deemed to have found that there was neither mismanagement nor gross neglect.

I think the difficulty in this part of the case lies in the first paragraph of the Order of the Court of Appeal:—

> "It is ordered that this appeal be allowed and that the defendant's counterclaim be dismissed".

Reading the reasoned judgment I doubt if this is what was intended. At the foot of page 73 of the report Terrell, J. sets out the variations which must be made in Burton, J's. decree consequential on the judgment which he had just read. Among these variations were "paragraph 7 will be set aside". Paragraph 7 was the paragraph in which $6,900.00 damages for trespass were awarded and at page 70 Terrell. J. said that an action for trespass would not lie.

As I understand Terrell, J's. judgment paragraph 7 of Burton, J's. order must be set aside because the damages were assessed on a wrong principle and that the proper damages were such damages as were occasioned by Murugappa's gross negligence if such gross negligence were established. As the question whether or not there had been gross negligence was not argued before Burton, J., the case before him being damages for trespass, the Court of Appeal left the whole question of gross negligence open and directed accounts on the footing of wilful default, and inquiries as to the plaintiff's (Murugappa's) gross negligence while in possession.

I now return to the Order of the Court of Appeal as drawn up. That order contains 18 different orders. The first I have already set out dismissing the counterclaim. The ninth set aside paragraph 7 of Burton, J's. order. The fifth ordered that an account be taken by the Registrar on the footing of wilful default. In the Judgment of Terrell, J. setting aside the Registrar's certificate he said that this part of the order should have read "That an account be taken of all moneys received by the plaintiff from the sale of rubber etc. or which without the wilful default of the plaintiff might have been so received". As the parties and Registrar proceeded with the inquiry on this basis Terrell, J. accepted this as the proper interpretation of the order and no question now arises upon this point.

The sixth ordered "that an inquiry be had by the Registrar as to whether any or which acts or omissions by the plaintiff while in possession of the said lands constituted such gross negligence as to make the plaintiff accountable therefor to the defendants and as to the amount (if any) for which the plaintiff should account to the defendants".

It was never suggested during the argument that the part of paragraph 1 dismissing the counterclaim was a slip in drawing the order and no application was made to amend the order. But it appears to me that paragraph six orders an inquiry into the counterclaim and if this is a right view of it, is is inconsistent with the counterclaim having been dismissed.

If an order contains contradictory directions it is permissible to look at the reasoned judgment to ascertain whether the judgment was self contradictory, and if it is found not to be self contradictory but to support one part of the order and not to support a contradicting part of the order, the part of the order which is supported by the reasons of the Court must prevail over the part which not only is not so supported but contradicts the part which is so supported. I think this follows from section 222 of the Civil Procedure Code. See too *Brijratan v. Jaynarain*[5] at 657 and *Langat Singh v. Janki Koer*[14].

The Court of Appeal ordered two different things —an account on the footing of wilful default and an enquiry as to whether the plaintiff was grossly negligent and if so, for what amount he should account to the defendant, which is another way of saying what damage has the plaintiff done to the property in which the defendant has a contractual interest?—always assuming that gross negligence is established. But the sum (if any) for which the plaintiff may have to account for gross negligence is not to be paid over as damages; it is to be set off against what the defendant owes.

Paragraph 9 of the decree of Burton, J. as amended by the decree of the Court of Appeal now reads:—

> "It is ordered that the defendant firstly above named (Sinavasagam) do pay to the plaintiff the sum found due by the account directed to be taken in paragraph 1 hereof together with the amount of the costs hereinafter directed to be taxed and paid to the plaintiff by the defendant firstly above named after deducting therefrom the sum for which by the account and enquiry by this order directed (i.e. by paragraphs 5 and 6 of the Order of the Court of Appeal) to be taken and had the plaintiff shall be found to be accountable to the defendant firstly above named".

The Registrar, in his written reason for his certificate, said "the principle by which I am guided in weighing the evidence on this point of gross negligence is set out in the words of Terrell, J." He then quoted the passage emphasising that this was an agricultural estate and stating that a certain minimum of care and cultivation was clearly necessary. Before the Registrar three heads of gross negligence were alleged but this appeal only concerns one which is referred to as reconditioning. The word is not a very choice one because it refers more to the measure of damages for the gross negligence than to the gross negligence itself. What was meant and understood by the word was failure to maintain and the claim was for what would be the cost of reconditioning or putting into proper condition the estate which had fallen out of condition due to Murugappa's failure to take a minimum of care of, and to do a minimum of cultivation on the rubber land after he had entered into possession of it.

The Registrar found that Murugappa was not negligent. He considered that Murugappa would have been liable on the four surcharges if he had no excuse. He found that Murugappa had an excuse and therefore he disallowed the surcharges.

On the motion to set aside the Registrar's certificate Terrell, J.A. reviewed the evidence and found that Murugappa had not maintained or cultivated Blocks C and D, that he had no excuse for not doing so. He set the Registrar's certificate aside and ordered that the matter be referred back to the Registrar to assess the damages (if any) due to failure on the part of Murugappa to maintain and cultivate these blocks and also to assess the consequential damages under the four surcharges.

What I have hitherto referred to as block C was a block of 44 acres referred to in argument as block C1 24 acres and C2 20 acres.

In the proceedings before Terrell, J.A. to set aside the Registrar's certificate the case of the then appellant Seenivasagam was thus stated by the learned Judge:—"As regards C1, C2 and D it is alleged that the Registrar misdirected himself in finding that there was no gross negligence on the part of the plaintiff (i.e. the present appellant) in the management of these areas, and in respect of blocks C2 and D that the Registrar likewise misdirected himself in finding that the plaintiff was not accountable on the footing of wilful default because of his failure to recover any rubber from those areas during the period that he was in possession.

As Mr. Braddell put it, the appeal involves a claim to surcharge to the amount of $4,897.49 and a claim for an unspecified amount for damages for reconditioning which had been allowed to go out of condition owing to Murugappa's alleged gross negligence.

I think the order of the Court of Appeal and the judgment of the Court of Appeal allowed these two claims to be made.

The case therefore resolves itself into two questions of fact (a) did the evidence before the Registrar shew that the plaintiff had been grossly negligent in the care and cultivation of the lands while he was in occupation? and (b) did the evidence before the Registrar shew that the plaintiff through his wilful default did not collect rubber which he might have collected?

On the first of these questions it was argued that as the plaintiff had taken no care and done no cultivation he was guilty of gross negligence. The Court of Appeal deliberately refrained from saying whether Murugappa was grossly negligent or not. They ordered that issue to be tried by the Registrar because it had not been tried by Burton, J.

It is the bounden duty of a mortgagor, if he knows the mortgagee is doing something injurious to the property, or that he is not making the most of it, to inform him of what is going on and what ought to be done. *Millet v. Davey*[16].

It was contended that if the mortgagee was at fault, the respondent stood by and acquiesced in and indeed invited the neglect. It was also contended that the estate was in a very neglected condition when the appellant went into possession and that on the principle of *Richards v. Morgan*[20] there was no duty upon him to improve the estate.

If either of these contentions of fact is established the omission to maintain and cultivate will not have been gross negligence.

The respondent who was heavily in arrears went to Ceylon in January 1932 and did not return until March 1933. In February 1932 the appellant entered into possession as he was entitled to do.

The appellant relied on three letters from Seenivasagam. On the 28th April, 1932, Seenivasagam wrote:—

> "All that I am worried about is that if there is no proper supervision everything will be ruined and our capital will be lost. There is no advantage in tapping rubber with the price as at present. Please do not tap on any of our estates".

Now what was the effect of this letter? In cross-examination Seenivasagam said (Blue Book p. 312). "The chetty would not be able to get interest if I stopped tapping. No one would pay for the upkeep then. It would not be upkept. If it is not upkept blukar and lalang will grow". Therefore it must have been in Seenivasagam's mind that if the estate was not tapped and if he himself was not in possession the estate would not be weeded and maintained.

The Registrar found that this letter of the 28th April, 1932, excused Murugappa's inertia. Terrell, J. thought this letter could not possibly be regarded as a direction not to tap in 1934 and 1935, when the price of rubber had greatly risen and when blocks C2 and D had come into bearing.

Seenivasagam was in this country from March 1933 and knew what was going on but there is no evidence of any complaint of neglect until February 1934, when rubber had risen to 16.5/16 cents and by which time the appellant had been two years in possession and the neglect in which Seenivasagam had up to then acquiesced had resulted in two years growth of blukar and lalang.

It is true that during this period Seenivasagam wrote several letters stressing the importance of weeding. On the 25th February, 1932, he wrote saying that the property should be maintained in good condition but at the same time he said that expenses should be curtailed as far as possible. Again, on the 25th May, 1932, he emphasised the necessity of maintaining the estate "if that is neglected, it will end in a total loss". In this letter Seenivasagam proposed to devote the commuted portion of his pension (which he did not expect to receive before September 1932), in doing one round of weeding on the estates.

In the first half of 1933 there was some delusion about a gold mine being on the property which would render cultivation of rubber of small importance while the delusion lasted as Seenivasagam then contemplated the estate being sold at $1,000.00 per acre.

In April, 1934, Messrs. Sisson & Delay wrote complaining that the estate was being very badly managed and completely neglected as regards upkeep work for the past two or three years and that it would cost about $6,900.00 to clean it and get rid of the lalang. Murugappa at that date had been two years and two months in possession.

There is no evidence whatever that the appellant was called upon or expected to do weeding the first two years during which he was in possession. Weeding costs money and the only suggestion about paying for weeding was Seenivasagam's suggestion that he would pay for it himself. During all that time he was hoping that he would be allowed to go back into possession when perhaps he would devote his own labour to weeding or manage in some way or other to have weeding done but he never seems to have expected Murugappa to put his hand in his own pocket to pay for weeding, nor did he ask him to do so, nor did he ask him to tap and earn the wherewithall to pay for weeding.

I notice that in 1932 and 1933 the highest price for rubber was 13.9/16, and it is probable that the request not to tap applied to those years.

In 1934 when prices were much higher the estate had suffered from two years of neglect, the fruits of Seenivasagam's request, and the large sum of $6,900.00 would then have been required to put the estate into condition.

By the time he complained litigation was pending and Cheroh had got into such a condition that to re-condition would have been more than to maintain the estate: it would have been to improve the estate which would have been beyond the obligation on a mortgagee in possession.

Having regard to the letter of the 28th April, 1932, Seenivasagam cannot complain of Murugappa's failure to collect rubber in 1932 and 1933. By 1934 the estate was in a condition that it could not conveniently be tapped.

The respondent failed to exercise his rights or duties as a mortgagor as described in *Millet v. Davey*[16] and on this ground I would allow the appeal with the usual consequences.

Gordon-Smith, J.—I have had the opportunity of reading and considering the Judgments of Poyser, C.J., F.M.S., and McElwaine, C.J., S.S., and therefore it is unnecessary for me to set out in detail the facts or events leading up to this appeal.

A great deal of the argument addressed to us was in relation to the passage in the Judgment of Terrell, J., in the Court of Appeal Judgment quoted in each Judgment of the Chief Justices, and I need not set it out again here. The first three issues framed by Mr. Braddell (quoted by both Chief Justices in their Judgments) all relate thereto and are on the question of whether this passage, or more particularly the direction that it was the duty of appellant "to exercise a certain minimum of care and cultivation", was *obiter dictum*. In reply thereto, Mr. O'Connor submitted that the issue before us was whether the subsequent Judgment of Terrell, J., setting aside the Registrar's Certificate was correct and not whether his Judgment in the Court of Appeal was correct, and it was admitted by Mr. Braddell that if this Court held that these directions were not *obiter*, then they were binding and this Court could not review or go back on them.

The other main issue was whether the Respondent had stood by so as to lose any remedy he might otherwise have had.

As regards the first point, I do not share the hesitation of Poyser, C.J., in coming to the conclusion that these directions are not *obiter*. The particular direction referred to above is immediately followed by the words "It must be a matter of enquiry as to whether any or which acts or omissions by the Plaintiff constituted such gross negligence as to make the Plaintiff accountable therefor", and "I would accordingly set aside the orders to account made against the Plaintiff in Suits 2 of 1934 and 7 of 1934", which suits specifically related to the Karak, Bentong and Cheroh Estates.

Later in the Judgment and after detailing the specific variations to be made in the decree in Suit 2 of 1934, the learned Judge then gave directions as to the variation of the decree in Suit 7 of 1934 (Bentong and Cheroh Estates) and stated "Paragraphs (4) and (5) will be set aside and in lieu thereof there will be an account and inquiry *as indicated above*". These, in my opinion, are clear directions in and part of the *ratio decidendi* of a Judgment, which are followed out in the subsequent decree, and as stated above, command the Registrar to hold an inquiry into accounts upon the footing of wilful default and gross negligence and to have regard to the direction that a certain minimum care and cultivation was necessary. In doing so, the Registrar specifically had such regard.

In considering this part of the Judgment it must be remembered that the Court of Appeal held that the Defendant's counter-claim for damages by way of trespass was misconceived, and the Plaintiff having sued (*inter alia*) for accounts, accounts were ordered on the analogy that he was a mortgagee in possession and it had been conceded that as such, he would be liable for gross negligence.

This question of gross negligence had never been pleaded or substantively argued before the trial Judge but all the facts were in evidence both before him and before the Court of Appeal. The Court of Appeal therefore directed that on the enquiry before the Registrar the evidence taken before the trial Judge should be admissible (and also further evidence, if it was desired to bring any,) on this question of gross negligence, which question was left to the Registrar to find or negative, as a question of fact. It seems to me also that as a matter of law and in so considering this question of fact, the Registrar was directed in law to have regard to the fact that a certain care and cultivation was necessary. It would also appear that in laying down this principle of law, the learned Judge was extending the principle laid down in *Wragg v. Denham* (applying to mis-husbandry of an agricultural estate in England) to a rubber estate in Malaya which may or may not be correct. I am, however, clearly of opinion that this Court cannot, in these proceedings, interfere with that principle so laid down and perhaps enlarged. For these reasons I am of the opinion that the direction was not *obiter*.

What was meant by "a certain minimum of care and cultivation" and whether such was carried out, is a difficult matter. I agree with Poyser, C.J., and for the reasons given by him that these directions applied generally to all the estates and not to any particular block of any individual estate.

I come, therefore, to Mr. O'Connor's point as to whether the subsequent Judgment of Terrell, J., setting aside the Certificate of the Registrar was correct and a consideration of this necessarily involves consideration of Mr. Braddell's points on the question of the Plaintiff's standing by.

These matters have been dealt with exhaustively and at length by both the learned Chief Justices in their Judgments, and I find myself in agreement with their conclusions and the grounds for such conclusions, it seems unnecessary for me to reiterate them.

I am, therefore, of the opinion that the appeal should be allowed with costs, and a certificate for two Counsel. *Appeal allowed.*